

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

INTERSTATE INDUSTRIAL MECHANICAL)	
INC.,)	PCHB Nos. 88-147 & 88-175
)	
Appellant,)	
)	
v.)	FINAL FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
PUGET SOUND AIR POLLUTION)	AND ORDER
CONTROL AGENCY,)	
)	
Respondent.)	

This matter came on for hearing before the Pollution Control Hearings Board, William A. Harrison, Administrative Appeals Judge, presiding. Board Chair Judith A. Bendor was present in the morning. She and members Wick Dufford and Harold S. Zimmerman, have reviewed the record.

The matter is an appeal from notices of violation and civil penalty relating to asbestos removal.

Appearances were as follows:

1. Bernard J. Heavey, Jr., Attorney at Law represented appellant Interstate Industrial Mechanical, Inc.

1 2. Keith D. McGoffin, Attorney at Law, represented respondent
2 Puget Sound Air Pollution Control Agency.

3 The hearing was conducted at Lacey, Washington, on January 19,
4 1990.

5 Kathryn A. Beehler of Gene Barker Associates, provided court
6 reporting services.

7 Witnesses were sworn and testified. Exhibits were examined.
8 Argument of counsel was submitted. Having heard or read the foregoing
9 and being fully advised, the Pollution Control Hearings Board makes
10 these

11 FINDINGS OF FACT

12 I

13 This matter concerns a warehouse on Airport Way which was
14 constructed some 20 years ago with a concrete asbesetos board
15 underlining in its roof and a concrete asbestos wall adjacent to its
16 boiler room (south wall of the warehouse).

17 II

18 Sabey Corporation recently purchased the warehouse. It was
19 Sabey's objective to remove the concrete asbestos. This required
20 demolition of the roof and removal of the south wall.

21 III

22 Sabey selected Interstate Industrial Mechanical, Inc., as its
23 asbestos removal contractor. On June 2, 1988, Interstate filed a
24 Notice of Intent to Remove Asbestos with Puget Sound Air Pollution
25

-6 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER.

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1 Control Agency (PSAPCA). The Notice specified that 17,600 square feet
2 of roof was to be removed. The roof had been constructed in the
3 fashion of a suspended ceiling with T-bar braces supporting separate
4 panels of concrete asbestos board (CAB). The CAB panels formed the
5 underside of the roof and a mixture of gypsum and other materials
6 overlay the panels in some depth. Interstate's Notice to PSAPCA
7 indicated that demolition would proceed from the top layers downward
8 so that the CAB panels could be lifted from the T-bar. In practice,
9 however, sawing through the gypsum layers posed a probability of
10 fugitive emissions. Therefore, Interstate changed its approach to one
11 of wetting, scoring and removing the CAB panels from below. This left
12 fragments of the panel edges pressed tightly between the T-bars and
13 the overlayment. These fragments could not be removed until the upper
14 roof was removed. Interstate was not responsible for removing the
15 upper roof.

16 IV

17 Interstate's contract with Sabey called for removing the asbestos
18 between June 13 and July 15, 1988. The removal of the CAB roof
19 panels, some 1,650 of them each 2.67 feet x 4 feet, proceeded within
20 this period. Plastic enclosures, negative air pressure, respirators,
21 wetting and other appropriate precautions were taken in removing the
22 CAB panels. The CAB was bagged and removed to a landfill.

V

While the vast preponderance of asbestos was removed without incident, some broken asbestos pieces were left by Interstate on the ground outside the warehouse. The aggregate quantity represented by the broken asbestos pieces outside the warehouse was equivalent to about 1 1/2 of the CAB panels. Some of the broken asbestos pieces may have been on the ground prior to Interstate's actions, but a significant amount were the result of Interstate's asbestos removal. It is probable that the asbestos pieces on the south side of the warehouse had become lodged in the contours of the corrugated siding behind bracing members, and then fell to the ground when the siding was removed.

VI

Because Interstate had not previously worked in PSAPCA's jurisdiction, PSAPCA sent its inspector to the work site. On his arrival, on July 14, 1988 at about 2:00 p.m., the inspector noted that work was nearing completion. The activity by Interstate was chiefly concerned with cleanup, and there were no plastic enclosures on site. The inspector pointed out the broken asbestos pieces to Interstate's foreman, indicated they had to be cleaned up that day, and said he would return the next day.

VII

On the next day, July 15, 1988, PSAPCA's inspector returned to

1 the job site at 8:00 a.m. He saw, again, broken pieces of asbestos
2 outside the warehouse. These were not wetted, had not been removed at
3 the end of the preceding day and were in an area open to others, aside
4 from asbestos removal workers. The inspector took samples of the
5 broken pieces. Laboratory analysis confirmed that they were 35% to
6 45% chrysotile asbestos. The broken asbestos pieces found by the
7 inspector were not friable, that is, they could not be pulverized by
8 the strength of one's hand.

9 VIII

10 After the inspector departed, around 9:30 a.m. on July 15, 1988,
11 Interstate continued cleaning up until 10:00 p.m. that night. The
12 floor of the warehouse was swept, washed and squeegeed by Interstate.
13 Interstate then withdrew from the job having removed the CAB roof
14 panels excepting those fragments pinched between the T-bars and upper
15 roof.

16 IX

17 After the inspector left on July 15, 1988, he next returned to
18 the site on July 19, 1988. In the interim, workers from other
19 contractors, (not Interstate), had begun demolition of the remaining
20 roof. A portion of the roof had been demolished when the inspector
21 arrived on July 19, 1988. The inspector found broken asbestos pieces
22 in the debris pile resulting from the portion of the roof demolished
23 by the other contractors (not Interstate). The inspector requested
24

1 that the other contractors wet the debris pile, and they complied. No
2 notice of violation or penalty was issued to the other contractor or
3 any person, in regard to the broken asbestos pieces in the debris
4 pile. However, the inspector also noted broken asbestos pieces on the
5 floor along the north and west walls of the warehouse and on a beam
6 located overhead. The inspector evidently assumed that these were
7 left over from Interstate's earlier activity. However, owing to the
8 clean condition in which Interstate left the floor, it is probable
9 that the broken asbestos pieces found on the floor on July 19, 1988,
10 resulted from the partial roof demolition conducted by contractors
11 other than Interstate, after Interstate's departure. The aggregate
12 quantity of the broken pieces found on the floor and near the walls
13 and on the beam on July 19, 1988, was equivalent to about 1/2 of a CAB
14 roof panel.

15 X

16 Subsequently, PSAPCA issued a Notice of Violation citing its
17 asbestos regulations and imposing a \$1,000 civil penalty against
18 Interstate and Sabey Corporation for the events of July 15, 1988, and
19 a similar Notice of Violation and \$1,000 civil penalty for the events
20 of July 19, 1988. From these, Interstate appeals, Sabey Corporation
21 did not appeal.

22 XI

23 Any Conclusion of Law which is deemed a Finding of Fact is hereby
24 adopted as such. From these Findings of Fact, the Board makes these
25

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

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CONCLUSIONS OF LAW

I

The notices of violation and civil penalty in this matter cite violation of Section 10.04(b)(2)(iii)(A) and (B) and (C) of PSAPCA's Regulation I. These provide:

10.04(b) It shall be unlawful for any person to cause or allow the removal or encapsulation of asbestos material or to work on an asbestos project unless:

(2) The following procedures are employed:

(iii) Asbestos materials that have been removed or stripped shall be:

(A) Adequately wetted to ensure that they remain wet until they are collected for disposal; and

(B) Collected for disposal at the end of each working day; and

(C) Contained in a controlled area at all times until transported to a waste disposal site; and . . .

II

The term "asbestos material" is defined in PSAPCA's Regulation I to mean:

" . . . any material containing at least one percent (1%) asbestos as determined by polarized light microscopy using the Interim Method of Determination of asbestos in Bulk Insulation Samples contained in Appendix A of Subpart F in 40 CFR Part 763, unless it can be demonstrated that the material does not release asbestos fibers when broken, crumbled, pulverized or otherwise disturbed. (Section 10.02(e), emphasis added.)

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

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1 First, it is PSAPCA's burden to prove the elements of a violation in a
2 penalty case such as this one. As that burden relates to the
3 provision above, PSAPCA did prove that the material at issue was
4 "asbestos material" as defined down to the proviso underlined above.
5 We conclude that the burden of going forward with the evidence then
6 shifts to the appellant to show a situation within the proviso.
7 Savage Enterprises, Inc., v PSAPCA, PCHB No. 86-101 (1987). The
8 appellant did not carry this burden. To meet this burden more must be
9 shown than merely that the material in question is not friable.
10 PSAPCA's regulations do not turn on whether the material is friable,
11 but whether the material may release asbestos fibers when disturbed by
12 a force of any strength, not only the hand strength associated with
13 friability. PSAPCA can depart from a friability test even though such
14 a test is used by other agencies which regulate. The
15 intergovernmental scheme is one of comparable or greater stringency as
16 one progresses from the federal to the state to the local level.
17 42 USC 7416; RCW 70.94.331(6). Savage Enterprises, Inc. v. PSAPCA,
18 PCHB NO. 87-176 (1989).

19 III

20 Interstate violated PSAPCA Section 10.04(b)(2)(iii)(A) and (B)
21 and (C) of Regulation I on July 15, 1988, by leaving on the ground
22 asbestos material which was not wetted, nor collected at the end of
23 the preceding day, nor in a controlled area. We believe the \$1,000
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26 FINAL FINDINGS OF FACT,
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(8)

civil penalty should be reduced in light of the lack of any prior violations of the asbestos regulations by Interstate. The penalty should be abated to \$750.

IV

PSAPCA did not prove a violation of its Regulation I by Interstate on July 19, 1988. The asbestos material found then was not shown to be the result of Interstate's work, and is the probable result of work by another contractor after Interstate's departure from the site.

V

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

The Notice of Violation against Interstate for July 15, 1988, is affirmed, and the civil penalty is abated to \$750. The Notice of Violation and civil penalty against Interstate for July 19, 1988, are each reversed.

DONE at Lacey, WA, this 26th day of February, 1990.

POLLUTION CONTROL HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Chair

Wick Dufford
WICK DUFFORD, Member

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge